

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.354 of 1995

1. Munshi Sah son of Ramjee Sah, resident of village Chiranjibipur, Police Station Bachhawara, District Begusarai.
2. Magnu Sah @ Mannu Sah son of Munshi Sah, resident of village Chiranjibipur, Police Station Bachhawara, District Begusarai.
3. Nokhe Sharma son of Jalim Sharma, resident of of village Fateha, Police Station Bachhawar, District Begusarai
4. Daya Nand Sharma son of Bulan Sharma, resident of of village Fateha, Police Station Bachhawar, District Begusarai

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Ms. Vaishnavi Singh, *amicus curiae*
For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 09-12-2021

Ms. Vaishnavi Singh, learned counsel submitted that Ms. Babita Kumari, learned *amicus curiae* is in some personal difficulty. She submitted that if permitted, she may assist the Court in the matter.

2. On query, she stated that on the request made by the learned *amicus curiae*, she has gone through the paper book and is ready to assist the Court.

3. In view of the submission made by Ms. Vaishnavi Singh, learned counsel, we permit her to assist the Court in the matter as *amicus curiae*.

4. This appeal is directed against the judgment of conviction and order of sentence dated 27th September, 1995 passed by the learned District and Sessions Judge, Begusarai in Sessions Case No.



65 of 1990 whereby and whereunder the appellants have been held guilty for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life.

5. The prosecution case in short according to the informant Ramdeo Choudhary (P.W. 8) is that in the night, intervening between 11.12.1988 and 12.12.1988, he was sleeping at his Bathan with his son Ajay Kumar. At mid-night, four persons came there and tied him to the stand of Chowki by rope and forcibly took away his son towards north. He identified all of them as Nokhe Sharma, Dayanand Sharma, Munshi Sah and Magnu Sah @ Mannu Sah. Thereafter, somehow he got himself untied and went to the village and narrated about the occurrence to his co-villagers. Subsequently, he along with Ram Balak Choudhary (P.W.2), Uday Kumar (not examined), Sunil Kumar (P.W.5) and Baliram Choudhary (P.W.1) went in search of his son who was found lying seriously injured north to his Bathan. His head and body were wounded and they resulted in profused bleeding. He brought him to the hospital at Dalsingsarai where he died during treatment. He has assigned the motive for the occurrence to be a quarrel which had taken place between his son and the accused persons four days ago.

6. On the basis of the aforesaid oral statement of the informant Ramdeo Choudhary recorded by one A. Ram, an Assistant Sub Inspector of Police, Dalsingsarai, Bachhawara P.S. Case No. 121 of 1988 was registered under Section 302 read with 34 of the Indian



Penal Code against Nokhe Sharma, Dayanand Sharma, Munshi Sah and Magnu Sah @ Mannu Sah on 12.12.1988 at 5.00 P.M. by the S.H.O. of Bachhawara Police Station, who took up the investigation of the case himself.

7. After the completion of investigation, the Investigating Officer submitted chargesheet under Section 302/34 on 07.03.1989 against the accused persons named in the FIR.

8. On receipt of the chargesheet, the learned Chief Judicial Magistrate, Begusarai took cognizance of the offence and after complying with the mandatory provisions as provided under Section 207 of the Code of Criminal Procedure committed the case to the court of Sessions for trial.

9. Subsequently, the Sessions Judge, Begusarai explained the charge under Section 302 read with 34 of the Indian Penal Code to the accused persons to which they pleaded not guilty. Hence, the trial commenced.

10. During trial, in all, the prosecution examined eight witnesses. They are: Baliram Choudhary (P.W.1), Ram Balak Choudhary (P.W.2), Dr. Anand Kumar (P.W.3), Kamal Kishore Choudhary (P.W.4), Sunil Kumar Choudhary (P.W. 5), Ramanand Choudhary (P.W.6), Prem Kumar Choudhary (P.W.7) and Ramdeo Choudhary (P.W.8). Apart from the oral testimony of the witnesses, the prosecution proved the post-mortem report of the deceased, which was marked as Exhibit-1, the signature of the informant on the fardbeyan,



which was marked as Exhibit-2, the signature of P.W. 2, Ram Balak Choudhary on the fardbeyan, which was marked as Exhibit-2/1 and the signature of P.W. 1 Baliram Choudhary, which was marked as Exhibit-2/2.

11. After the closure of the prosecution evidence, the statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure in which they pleaded their innocence.

12. The defence did not examine any witness during trial.

13. After the closure of the evidence, the arguments advanced on behalf of the parties were heard and vide impugned judgment of conviction and order of sentence, the appellants were held guilty for the offence punishable under Section 302/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life

14. Assailing the impugned judgment and order passed by the trial court, Ms. Vaishnavi Singh, learned *amicus curiae* submitted that the genesis of occurrence has not been proved by the witnesses examined during trial. She contended that the version of the informant as stated by him in the F.I.R. is not believable. According to her, in the night when some persons who were on inimical terms had come at the Bathan of the informant and tied him with the aid of rope, he did not raise hulla.

15. She contended that there is no eye witness to the incident of murder. Similarly, except the informant, there is no witness to the taking away of the deceased by the accused persons from his Bathan.



The informant has not stated that the accused persons were armed with any weapon. Under such circumstance, when the victim was being taken away, it is surprising that he did not put any resistance. He also did not raise hulla. She further contended that in the instant case the Investigating Officer has not been examined. His non-examination has seriously prejudiced the case of the defence. Because of his non-examination even the place of occurrence could not be established. She argued that there are several inconsistencies in the testimony of the witnesses regarding the time when they accompanied the informant for the search of his son and his recovery. She argued that the medical evidence creates serious doubt about the veracity of the testimony of the informant.

16. On the other hand, Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State submitted that the informant has fully corroborated the prosecution case as narrated by him in the F.I.R. He contended that the medical evidence is also in alignment with the oral testimony of the witnesses. According to him, there is no set formula under which a human being would react in a particular facts and circumstance. The non-raising of hulla by the informant or the deceased or not putting any resistance by the deceased while he was being taken away cannot be considered to be a relevant factor for doubting the prosecution case. He contended that minor inconsistency in the testimony of the witnesses would be of no consequence as the



major part of the occurrence has been supported by all the witnesses examined during trial.

17. We have heard learned counsel for the parties and carefully perused the records.

18. The informant has stated in his deposition that on the date of occurrence, he and his son Ajay Kumar were sleeping in the night at their Bathan. At midnight, the accused persons, namely, Nokhe Sharma, Munshi Sah, Magnu Sah @ Mannu Sah and Dayanand Sharma tied him to a stand of the chowki on which he was sleeping by rope. They forcibly took away his son towards north. After they left the place, somehow he untied himself and narrated the incident to his co-villagers Kamal Choudhary, Balram Choudhary, Sunil Choudhary and Ram Balak Choudhary. He went along with them in search of his son at about 01:30 A.M. on 12.12.1988. He found his son in unconscious state near the boring situated in the north to his Bathan. He was bleeding from his head. He took his son to Dalsinghsarai Government Hospital where he died during treatment on the same day. In the hospital, the Assistant Sub-Inspector of Police came and recorded his fardbeyan over which he put his signature. He proved his signature, which was marked as Exhibit-2. He also proved the signature of P.W. 2 Ram Balak Choudhary and P.W. 1 Baliram Choudhary, which were marked as Exhibit-2/1 and 2/2 respectively.

19. In his cross-examination, he stated that when the accused persons were tying him, he did not raise any hulla. He stated that they



He admitted that he tied his belly by rope and left both of his hands free. He admitted that he woke up when the accused persons were rolling the rope around his belly and tying it to the stand of chowki but he did not cry or try to run away. He admitted that his son was awoken. He did not raise hulla or try to run away. He did not put any resistance and was taken away by the accused persons. He admitted that his son was found lying in the field of one Ramashray Sah. He stated that the boring of Ramashray Sah is situated at a distance of 25-30 yards from his field. He further admitted that no pumping set of Ramashray Sah is installed at that place.

20. From the evidence of the witnesses examined during trial on behalf of the prosecution, it would be evident that except the informant none of the prosecution witnesses claim to be an eye witness to the incident of taking away the son of the informant from his Bathan by the accused persons. So far as the incident of assault upon him is concerned, there is no eye witness.

21. P.W. 2 Ram Balak Choudhary, P.W. 6 Ramanand Choudhary and P.W. 4 Kamal Kishore Choudhary claim themselves to be the hearsay witnesses. P.W. 7 Prem Kumar Choudhary has been declared hostile at the request of prosecution. He has stated that he had not given his statement to the police during investigation. He further stated that when the occurrence took place, he was at Patna.

22. So far as P.W. 1 Baliram Choudhary is concerned, when we compare his evidence with the testimony of the informant, we find that he contradicted him on material particular. He stated that when he



came to know about the incident from the informant, he went together with him in search of his son in the night. Since they could not trace the victim in the night, they came back to their house. In the morning, he found the son of the informant lying in an injured condition at a place where the pumping set of the appellant Munshi Sah was installed whereas the informant has stated in his deposition that his son was found in the night itself in an injured condition. Further, the informant stated that the victim was found in the field of Ramashray Sah whereas the P.W. 1 stated that he was found at a place where pumping set of Munshi Sah was installed.

23. We further find that P.W. 1 has stated in his testimony that in the night the informant Ramdeo Choudhary was being accompanied only by him and not anyone else whereas the informant has stated that in the night hours he went together with Kamal Kishore Choudhary, Baliram Choudhary, Sunil Choudhary and Ram Balak Choudhary in search of his son.

24. When we carefully look at the deposition of P.W. 2 Ram Balak Choudhary, we find that he has not whispered a word about being told by the informant in the night of the occurrence or that he accompanied the informant for searching his son. According to him also, the victim was found in an injured condition at a place where pumping set of Munshi Sah was installed. He has categorically stated that he came to know about the incident in the morning on 12.12.1988. Similarly, P.W. 4 Kamal Kishore Choudhary is not consistent with the



testimony of the informant. In his deposition, he stated that in the night, he was fast asleep and his neighbour Baliram Choudhary (P.W. 1) awoken him. He said that there is some hulla in the western side. By the time he awoke, hulla had stopped. Hence, he said that he would look into the matter in the morning. He stated that in the morning when he reached at the pumping set of Munshi Sah, several persons had assembled there from before. He saw there that the son of the informant was lying in unconscious state in an injured condition. The informant was telling the persons present there that the accused persons, namely, Munshi Sah, Magnu Sah @ Mnnu Sah, Nokhe Sharma and Dayanand Sharma had assaulted him. He stated that when he saw the victim, he was profusely bleeding. He has also not supported the testimony of the informant that he had gone together with him in the search of his son in the night and his son was recovered in an injured condition from the field of Ramashray Sah.

25. P.W. 5 Sunil Kumar Choudhary, the nephew of the informant and the cousin brother of the deceased has stated in his deposition that the dead body of the victim was recovered from the field of Ramashray Sah. Thereafter, he says that at that time, the informant's son was in an injured condition and was in state of unconsciousness. He further stated that when the victim was found Baliram Choudhary and Kamal Kishore Choudhary were together with him.

26. P.W. 6 Ramanand Choudhary stated in his evidence that Ajay Kumar, the son of the informant, was murdered. He had seen his



dead body at the place where the boring pump was installed. He stated that the informant Ramdeo Choudhary told that Munshi Sah, Magnu Sah @ Mannu Sah, Nokhe Sharma and Dayanand Sharma had killed his son. He stated that the body of the deceased was found near boring pump. He has not mentioned it was whose boring pump. He stated that he did not know who killed him. He admitted in cross-examination that he did not state before the police in his statement that Munshi Sah, Magnu Sah @ Mannu Sah, Nokhe Sharma and Dayanand Sharma had killed the son of the informant.

27. Thus, from the depositions of P.W. 5 and P.W. 6, it would be evident that when the victim was recovered, he was not alive whereas the remaining witnesses have deposed that when the victim was found, he was in an injured condition and was in state of unconsciousness. The informant has categorically stated that the victim was taken to the hospital at Dalsinghsarai where he died during treatment. The doctor who treated him has not been examined. No document relating to his treatment has been brought on record.

28. The doctor who conducted the post-mortem examination has been examined. Dr. Anand Kumar (P.W. 3) stated in his testimony that on 13.12.1988 at 10:00 A.M. he held post-mortem examination on the body of the son of the informant. He stated that rigors mortis was present in all limbs and following anti-mortem injuries were found on the dead body:- (1) lacerated wound 1" x 1/4" x bone deep over scalp on the upper part of occipital region (2) lacerated wound 1" x 1/4" x



muscles deep over left leg on the mid region on the lateral side. On deep dissection of scalp, multiple fracture at left parietal bone and occipital bone on upper region was seen. Blood clot was found in intracranial region. Membrane was ruptured and brain tissues were lacerated of the same zone.

29. He stated that the time elapsed since death was within 48 hours and the weapon used for committing the offence was hard and blunt substance. In his opinion, the cause of death was due to shock and haemorrhage owing to the above-mentioned injuries. The injuries were sufficient to cause death in ordinary course of nature. He proved his signature on the post-mortem report which was marked as Exhibit-1.

30. In cross-examination, he admitted that there was no external bleeding from the injuries. He further admitted that the injuries found on the person of the deceased could be by fall on hard substance.

31. The testimony of the P.W. 3 creates doubt about the prosecution version as he has admitted in cross-examination that there was no external bleeding from the injuries on the person of the deceased whereas the informant and other witnesses examined during trial have stated that when the victim was recovered, he was profusely bleeding from his head and other parts of his body.

32. It is reiterated that the Investigating Officer of the case has not been examined during trial. It has rightly been pointed out by the learned *amicus curiae* that due to non-examination of the Investigating Officer, the case of the defence has seriously been



prejudiced. The place of occurrence would not be established due to the non-examination of the Investigating Officer.

33. From the discussions made above, it is evident that the witnesses examined during trial are not consistent on vital parts of the incident. The informant stated in the FIR that the victim was found lying in state of unconsciousness in an injured condition near the boring pump situated in the north of his Bathan. In his testimony, he stated that the victim was found lying in the field of one Ramashray Sah whereas his nephew Sunil Kumar Choudhary (P.W.5) stated in his testimony that the dead body of the victim was found from the boring pump of Ramashray Sah and the informant stated that no boring pump of Ramashray Sah is installed at the place from where the victim was found. The other witnesses like Baliram Choudhary (P.W.1), Ram Balak Choudhary (P.W.2) and Kamal Kishore Choudhary (P.W.4) have stated in their testimony that the victim was found from a place where the pumping set of the appellant Munshi Sah was installed.

34. Moreover, the time at which the victim was found after he was taken away by the accused persons also differs as the informant has stated in his testimony that he was found in the night at about 1.30 A.M. on 12.12.1988 whereas the other witnesses examined during trial have stated that the victim was located in the morning on 12.12.1988.

35. Thus, we are of the opinion that there is no consistency in the testimony of the witnesses either on the point of place of occurrence or on the time of recovery of the victim or the condition in



which the victim was found when the witnesses saw him. It is crystal clear from the testimonies of P.W. 1, P.W.2 and P.W. 5 that they had not accompanied the informant (P.W.8) in the night when he went out to search his son. They are not witness to the incident. Similarly, P.W. 4 and P.W. 6 are also not witnesses to the incident of either tying the informant or taking away his son or assaulting him. They all are hearsay witnesses. They all have given different version in their testimony from the testimony of the informant. The story narrated by the informant in his testimony relating to tying him to the stand of the chowki by rope and letting his hands free so that he may untie himself as well as not raising hulla at the relevant time or putting any resistance either by him or by his son seems to be highly unbelievable. The doctor who conducted the post-mortem examination contradicted the informant by saying that there was no external bleeding whereas the informant stated in his testimony that his son was profusely bleeding due to the injuries caused to him.

36. The credibility of testimony of the witnesses should create and inspire confidence and for inspiring confidence about credibility of the witnesses and the evidence, it should be free from contradiction and discrepancies. However, the normal discrepancies are bound to occur in the deposition of witnesses due to normal errors of observation, errors of memory and due to lapse of time or due to mental disposition. The discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be given undue



importance. Where the discrepancies create a serious doubt about the truthfulness of the witnesses while deposing before the court, such evidence cannot be safe to be relied upon. As seen above, in the instant case, the discrepancies go to the root of the matter and shake the basic version of the witnesses. Thus, it would be highly unsafe to rely upon the testimony of the witnesses. We are of the opinion that the trial court has not appreciated the evidence led before it in correct perspective.

37. Accordingly, the impugned judgment of conviction dated 27th September 1995 passed in Sessions Case No. 65 of 1990 by the learned District and Sessions Judge, Begusarai and the consequent order of sentence are set aside.

38. The appellants, who are on bail, are discharged from the liabilities of their bail bonds.

39. The appeal stands allowed.

40. The Patna Legal Services Committee is directed to pay Rs. 7,500/- to the learned *amicus curiae* as consolidated fee for assisting the Court in the present appeal.

(Ashwani Kumar Singh, J)

(Rajeev Ranjan Prasad, J)

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